In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 424

STANLEY ALEXANDER, ET AL., PETITIONERS

v.

PASADENA BOARD OF EDUCATION, ET AL.,

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–7) is not yet reported. The order of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1970. The petition for writ of certiorari was filed on July 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

402-076—70

QUESTIONS PRESENTED

1. Whether petitioners had a right to intervene under Rule 24a of the Federal Rules of Civil Procedure for the purpose of appealing the district court's school desegregation order, when the Board of Education, the principal defendant, acquiesced in the order.

2. Whether the district court's refusal to grant petitioners leave to intervene under Rule 24b—the permissive intervention provision—was an abuse of discretion.

STATEMENT

This school desegregation suit was commenced by private plaintiffs in August 1968. The United States intervened pursuant to Section 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000h–2, in December 1968. After a lengthy hearing on the merits, the district court, on January 23, 1970, ordered the school board to submit a desegregation plan.[1]

After the school board submitted its desegregation proposal, petitioners, parents of school-age children attending schools operated by the Pasadena City Board of Education, moved for leave to intervene pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The district court, which treated the motion under Rule 24 (a) and (b), denied intervention on the grounds that movants had been ade-

[1] In extensive findings of facts and conclusions of law, the district court held that the school board had committed racially discriminatory acts in the areas of student assignment, faculty and staff hiring and promotion, construction, intra-district transfers, and ability grouping. *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal.).

quately represented at all stages of the proceedings by the school board and the individual defendants; that the motion, filed subsequent to entry of judgment, was untimely; and that the Pasadena City Board of Education, which opposed the motion, would be prejudiced if it were granted.[2] The district court then approved the Board's school desegregation plan. The court's order denying intervention was appealed on an expedited schedule,[3] and the court of appeals affirmed.

ARGUMENT

1. The courts below correctly held that petitioners had no right to intervene under rule 24(a). Although petitioners contend that this holding conflicts with the decision in *Smuck* v. *Hobson,* 408 F. 2d 175 (C.A.D.C.), the opinion below specifically follows the rationale of *Smuck* and reaches a result entirely consistent with that decision. Because the authority to make educational policy is vested in the school board, rather than the parents, both courts of appeals agreed that parents have the right to intervene in a suit like the present one only for the limited purpose of protecting "the freedom of their school board from excessive judicial interference" (Pet. App. 5) with the exercise of its discretion within constitutional bounds. See 408 F. 2d at 181–182. Under this rationale, the differences in the specificity of the desegregation orders and in other

[2] The United States stated (Rep. Pet. Tr. p. 25) that "we think it would be a proper exercise of this [district] court's discretion to permit these parents to intervene for the limited purposes of appeal" and that "we would not shrink from an appeal."

[3] At the same time, petitioners filed a protective notice of appeal from the decision approving the desegregation plan.

circumstances of the two cases called for the difference in result reached.

In *Smuck,* the trial court's decree included specific requirements "relating to optional zones, faculty integration and pupil bussing" (408 F.2d at 183), and the court of appeals held that the parents had a right to intervene in order to challenge these specific limitations on the school board's discretion. The court of appeals declined, however, to review other, more general aspects of the decree, at the behest of the parents, because they did not materially interfere with the school board's discretion (408 F.2d at 186–190). In the present case, the broad decree of the district court avoided prescription of specific measures, comparable to those reviewed (and upheld on the merits) in *Smuck.* In essence, the district court here merely ordered the board to submit a desegregation plan, and did not interfere with the board's discretion in choosing the means for achieving the constitutionally required result.[4] The interest in main-

[4] While there was a comprehensive desegregation plan before the court, which had been devised by the government's expert witness, its adoption and implementation were not required. Moreover, the district court's order included no specific student assignment, grade restructuring, construction, or transportation requirements. The school board was constrained only in the sense that it was ordered to develop a student assignment plan which would leave no schools with a majority of minority-race students (311 F. Supp. at 505). In providing remedies, district courts have broad discretion to fashion such general guidelines (see, *e.g.*, *United States* v. *Montgomery County Board of Education*, 395 U.S. 225) and, in doing so here, the district court did not materially interfere with the board's discretion to make educational policy.

taining the school board's discretion was, therefore, adequately protected by the board itself—there was, in other words, "adequate representation" of petitioners' interests for purposes of Rule 24(a). Cf. *City of New York* v. *United States,* 397 U.S. 248.

Moreover, the decision upholding a right of intervention in *Smuck* was based in part on the fact that a newly elected school board had replaced the appointed board. The latter made the decision not to appeal, but the former felt its effects. 408 F. 2d at 177. In the present case, the same elected board which decided to acquiesce in the district court's decision will presumably implement it.[5] Cf. *Alleghany Corp.* v. *Kirby,* 344 F. 2d 571 (C.A. 2), certiorari granted, 381 U.S. 933, certiorari dismissed, 384 U.S. 28; *Blocker* v. *Board of Education of Manhasset,* 229 F. Supp. 714, 715 (E.D. N.Y.).

2. The district court did not abuse its discretion under Rule 24(b) by denying leave for permissive intervention, once it concluded there was no right to intervene under Rule 24(a). The motion was filed after entry of judgment at a time when the Board was anxious to begin implementing its desegregation plan for the 1970–71 school year. The delay which would result from intervention constituted sufficient prejudice to existing parties to justify this exercise of the court's discretion.

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[5] The speculative prospect of a change in the membership of the board, whether by recall or the ordinary elective process, does not put this case "on all fours" with *Smuck* (Pet. 13–14). That case presented the unique situation of a fundamental change from an appointive to an elective board.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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